Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

No. 70-340

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

J. FRANK HANCOCK, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

JACK F. WHITE, JR.
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Clearwater, Florida

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

No. 70-340

J. FRANK HANCOCK, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR REHEARING

Petitioner, J. Frank Hancock brings this Petition for Rehearing from the order dated October 12, 1971, denying his Petition for Certiorari and for grounds alleges:

The jury may well have convicted this Petitioner of violating the rules and regulations of the Small Business Administration, which do not carry criminal penalties, rather than of violating the act under which he was charged.

Regrettably this point was not clearly presented to Trial Court nor to the United States Court of Appeals.

That there is error is irrefutable, although it was not readily ascertainable because of the intricacies of the case.

The point initially came to light in the Solicitor General's brief (p. 4-5) and a reply brief was at the printers when word was received that the Petition for Certiorari was denied.

Anthony DiMuzio, an unheralded witness for the government, took the stand and revealed that he was a financial

analyst for the Small Business Administration, (App. 193) and familiar with the rules and regulations of the Small Business Administration (App. 196, 197). Over objection he was permitted to state that the rules and regulations provided, inter alia, that small business investment companies could not make loans to relatives, or loans to individuals if it was not for the purpose of a small business (App. 197, 201).

The Defendant's brother was called as a government witness to testify that he had an interest in a corporation that had received a $7,500.00 loan from a corporation that had obtained a loan from Clearwater Capital Corporation (App. 268-271).

Gilbert Gerard, a witness for the government, testified that he received a loan from Clearwater Capital Corporation but that he did not need the money for the business at that time (App. 261, 262).

Thereafter the trial Judge instructed the jury that in each count a necessary element of the offense was "specific intent" to do wrong (App. 331) and that

> "A person, who knowingly does an act which the law forbids, intending with evil (466) motive or bad purpose either to wilfully disobey or disregard the law, may be found to act with specific intent."

The jury was further instructed that:

> "An act is done wilfully if done voluntarily and intentionally, and with specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law." (App 333).

No instruction was ever given defining what constituted the "law" or distinguishing the rules and regulations of the Small Business Administration from Section 657, Title 18 United States Code, or that violations of the rules and regulations themselves carried no criminal penalties and did not have the force of law in the case at trial (App. 323-337).

The rules and regulations of the Small Business Administration presented to the jury through the testimony of Anthony DiMuzio, were not properly before the jury and had no place under the circumstances of the trial of the case. This principle of law is clearly set forth in the Court's holding in the case of *United States v. Eaton,* 36 L. Ed. 591; 12 S. Ct. 764; 144 U. S. 677.

In that case the Court said:

> "Regulations prescribed by the president and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The principle of law clearly demonstrates the error in permitting testimony concerning violations of rules and regulations of the Small Business Administration. Where error is shown but not clearly demonstrated to be harmless by the facts themselves, prejudice is presumed. *Pettina v. New Mexico,* 119 CCA 581, 201 Fed. 492; *Deery v. Cray,* 5 Wall. 795, 18 L. Ed. 653; *Peck v. Heuvich,* 167 U. S. 624, 42 L. Ed. 302, 17 Sup. Ct. Rep. 927.

The point is that the regulations had been given no criminal sanction and yet were used in a criminal case to obtain a conviction.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JACK F. WHITE, JR.
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I, Jack F. White, Jr., counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Rehearing were furnished to Hugh N. Smith, Esquire, United States Attorney, United States Post Office Building, Tampa, Florida, and to Honorable Erwin N. Griswold, Solicitor General, United States Department of Justice, Washington, D.C. 20530, by mail, this_____ day of October, 1971.

_____

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